Midon Restaurant Corporation, d/b/a Burger King *and* Industrial Workers of the World, Philadelphia General Membership Branch. Case 3–CA–22075

August 11, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On June 16, 2000, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Midon Restaurant Corporation, d/b/a Burger King, Albany, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Add the following sentence to paragraph 2(a).

"(a) In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed down the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 2, 1996."

Alfred M. Norek, Esq., for the General Counsel.
Dennis F. Irwin, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me in Albany, New York, on March 6, 2000. The complaint, which issued on October 28, 1999,[1] and was based on an unfair labor practice charge and an amended charge that were filed on August 6 and October 27 by Industrial Workers of the World, Philadelphia General Membership Branch (the Union) alleges that Midon Restaurant Corporation, d/b/a Burger King (the Respondent) violated Section 8(a)(1) and (3) of the Act when it threatened to discharge employees who spoke about the Union, informed its employees that it would not permit a union at Burger King and that it maintained and enforced a rule prohibiting employees from discussing unions, and constructively discharged Jacob Fried because of his union and protected concerted activities.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits that during the prior 12-month period, it derived gross revenue in excess of $500,000 and purchased and received at its facilities within the State of New York goods and materials valued in excess of $50,000 directly from points outside the State of New York. I therefor find that the Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE FACTS

As stated above, it is alleged here that the Respondent, through Charles Betz, its district manager, engaged in certain 8(a)(1) conduct directed at Fried, and constructively discharged him on July 29. Because of the wide variances in the testimony of the three witnesses testifying to the events of July 29, each witnesses' testimony will be set forth separately.

A. Jacob Fried

Fried began his employ at the Burger King facility on Central Avenue, Albany, New York, (the facility), in late June or early July. He worked as a crew member making sandwiches, cleaning the floor, and operating the cash register. The store manager was Susan Hart; the shift manager was "Tye." Fried testified that on July 29 he was discussing the benefits of unionizing with a fellow employee and Hart overheard them talking and said that she thought that a union would not do them any good; she had been in a union, and it did nothing for her. He and Hart then engaged in a "debate" about the merits of a union. At about that time, Betz walked into the store and Tye told him that Fried had been talking about unions. Betz said that if he mentioned the word union again he could be looking for another job; if he wanted a union he should work in a supermarket which has unions.[2] Fried said that he felt that the employees needed a union because they were not being paid enough. Betz said that they were being paid enough and they didn't need a union. That was the extent of that conversation. A few minutes later, while he was working at the drive thru, Tye told him that Betz wanted to speak to him in the employees room, an alcove containing a table and chairs. At this meeting with just the two of them present, Betz said that he was the manager and could decide whether there could be a union at the facility, and that he would not allow a union. Fried said that he was wrong, it was the workers who decided if there should be a union. Betz became loud and angry and repeated that it was his decision, and he would not allow a union at the store. When Fried repeated that he did not agree, Betz took out a rule book and said that when Fried began working at the facility he signed

[1] The Respondent argued in its exceptions that the judge should have dismissed the complaint based on the Board's decision in *Super-H Discount*, 281 NLRB 728 (1986), which he cited in finding that the Respondent violated Sec. 8(a)(1) of the Act. In *Super-H Discount,* as here, the employer promulgated an overly broad no-solicitation rule restricting an employee's union activities. The Employer argued, and the Board found it established, that the employer's prohibition was a one-time incident that went ignored by the employee to whom it was directed since he continued to engage in union activities while "on the clock" without further restraint. We find that the present situation is factually distinguishable from *Super-H Discount*, and we therefore find it unnecessary to pass on the continuing validity of *Super-H Discount* in the context of this case.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[1] Unless indicated otherwise, all dates referred to here relate to the year 1999.

[2] In an affidavit given to the Board on August 5, Fried does not mention this alleged supermarket statement.

the book saying that he accepted all the rules in the book, and one of the rules is that the employees would not talk about unions, and this was company policy. Fried called Betz exploitive, told him to go to hell, gave him "the finger," and walked out, never to return, except to pick up his final paycheck. Fried testified that he walked out because Betz threatened to fire him if he discussed unions with other employees. On that day or thereafter, nobody at the facility told him that he was fired.

B. Charles Betz

Betz testified that the Respondent has a no-solicitation rule that prohibits solicitations (unions or otherwise) while on the clock. However, employees are free to talk while at work as long as it does not interfere with their servicing customers. Betz testified that he arrived at the facility at about 4 p.m. on July 29 for a routine visit. He said hello to the employees and discussed with them the importance of service time, quick and efficient service: "the more customers you get through an hour, the more sales you can do and the more successful we'll be." Fried then said in a loud tone of voice: "You don't pay me enough to do that." Betz then terminated this discussion and went to the office in the back of the facility. He was about to talk to Hart when he again heard Fried say something to the effect of, "You don't pay me enough to do this job." Shortly thereafter, Betz asked Tye to tell Fried that he wanted to speak to him. When Fried arrived at the employees' room, Betz asked him what his problem was, why did he have that attitude. At some point in the conversation, Fried mentioned unions (something to the effect of "you can't tell me how to organize unions") and Betz obtained a copy of the employee handbook and told Fried that when he was hired he signed the policy booklet acknowledging, "no solicitation in the restaurant, especially when you're on the clock." Betz tried to show the manual to Fried, who said: "You can't control my mind, you can't tell me not to organize a union." Betz got up to leave in order to speak to Hart about what was causing Fried to make these statements, and Fried told him: "You can stick this job up your ass" and gave him "the finger" with both hands and walked out the door. Betz testified that he does not remember having an earlier conversation with Fried about unions and never told Fried that he would never allow a union at the facility, or that he had the power to prevent a union from coming in. Fried did not return to work at the facility, although he was not fired. In an affidavit that the Respondent submitted to the Board during the investigation of this matter, Betz states that after he arrived at the facility, Hart told him that Fried was complaining "about certain aspects of the job," and was saying things to her like, you don't pay me enough. Betz testified, however, that it may have been the opposite, that Fried first made the statement in the meeting with Betz and the other employees, and then Betz asked Hart what his problem was. The affidavit also states that in response to Hart's report to him about Fried, he took Fried to the employees' lounge to "speak to him directly about these issues."

C. Susan Hart

Hart, the manager of the facility, testified that Fried had been soliciting some of the other employees about a union on July 28 and 29. Sometime in mid-afternoon on July 29, she, Fried, Tye, and Sonya Hackett were talking at the front counter at the facility; Fried began talking about unions, and Hart said that she was in a union in the 1980s and didn't like it. "I told him we don't have unions here. It's a non-union organization." At about that time Betz walked into the store for a regular visit; Hart had not asked him to come and had not told him about Fried's solicitations for a union. Betz addressed the employees and told them of the importance of speedy service. Fried said that they don't get paid enough for speedy service and Betz replied that it was their obligation to provide speedy service. That was the extent of the discussion, and Betz walked away, but remained in the vicinity wiping a countertop. At that time, Fried told the other employees that they would make more money if they had a union. At that point, Hart had to leave the facility to go to the hardware store and, prior to leaving, she saw Betz and Fried walking into the employees' room. She was gone for 8 to 10 minutes and she returned at the end of this meeting and heard Fried say something to the effect that Betz could not control his mind. Fried gave Betz the finger, with one hand only, told Hart that he quit, and walked out. The only time Fried returned to the facility was to pick up his paycheck a few days later.

III. ANALYSIS

Credibility is a big issue here. There is a major variation between Fried's testimony and that of Betz and, to a lesser degree, Hart. I found Fried, Betz, and Hart each to be fairly credible witnesses. Although none clearly stood out as the most credible, of the three, I found Hart to be more credible than Betz and Fried; although she is a supervisor for the Respondent, she appeared to be attempting to testify honestly about events that occurred 8 months earlier. She was not evasive and her testimony was more believable than the testimony of the other witnesses. I therefore credit the testimony of Hart over Fried's testimony and find that in the initial conversation on July 29, Betz did not threaten Fried with discharge if he spoke about unions and did not say that if Fried wanted to be in a union he should work at a supermarket. As Hart was not present for the main part of the subsequent conversation between Betz and Fried, it is necessary to determine credibility regarding the latter conversation of July 29. Having credited Hart's version of the earlier conversation over Fried, I would, again, discredit Fried's testimony regarding this conversation, and instead credit the testimony of Betz. I therefore find that in the subsequent conversation in the employees' room, Betz did not inform Fried that the Respondent would not allow a union at the facility. I would therefore recommend that these two allegations, paragraphs V(a) and (b), be dismissed. Betz does admit, however, that he told Fried that the employee handbook prohibits "solicitation in the restaurant, especially when you're on the clock."

In *Our Way, Inc.,* 268 NLRB 394 (1983), the Board returned to the principal that in cases involving the legality of rules involving solicitations at work, the term "working time" is presumptively valid because it indicates with sufficient clarity that employees may solicit on their own time, while the term "working hours" is presumptively invalid because it connotes periods from the beginning to the end of work shifts, which includes the employees' own time. *Ichikoh Mfg.,* 312 NLRB 1022 (1993), found the term "business hours" also to be presumptively invalid. In *Litton Systems,* 300 NLRB 324 (1990), the Board found the term "company time" also presumptively invalid because it "could reasonably be construed as encompassing both working and nonworking time spent on the company premises." *Southeastern Brush Co.,* 306 NLRB 884 (1992). *Ichikoh*, supra, also states: "If the rule is presumptively unlawful on its face, the employer has the burden of showing that it

communicated or applied the rule in such a way as to convey an intent clearly to permit solicitation during breaktimes or other non-work periods."

In *Super-H Discount*, 281 NLRB 728 (1986), the statement at hand was: "Do not talk union on the clock." The Board would have, apparently, found this to be violative of the Act; however, because of the totality of the circumstances—it was a single isolated situation and there was no evidence that the warning was ever communicated to any other employee—the Board dismissed the allegation. In *Red Arrow Freight Lines, Inc.*, 289 NLRB 227, 246 (1988), which involved a limitation of discussion "on company time," the administrative law judge stated:

> The reference to "company" time rather than "working" time is a material distinction. The former term implies all the time an employee is "on the clock" (being paid) which normally includes breaktimes. Because breaktimes are employees' free time in which they may discuss union activities or solicit their fellow employees to join or support a labor organization, Pennfield's instructions violated Section 8(a)(1) of the Act.

I find that Betz' statement violates the Act for two reasons. First, the restriction on solicitation while employees are "on the clock" is presumptively invalid. In addition, Betz' statement was really in two parts: the initial part was an absolute prohibition against solicitation, modified only by an "especially." This could easily be construed as an absolute prohibition. I therefore find that Betz' statement to Fried violates Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent violated Section 8(a)(1) of the Act by restricting solicitation at the facility, especially when employees are on the clock.
3. The Respondent did not violate the Act as otherwise alleged in the complaint.

REMEDY

Having found that the Respondent has unlawfully restricted solicitations at its facility, I shall recommend that it cease and desist from doing so and take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact, conclusions of law and the entire record, I issue the following recommended[3]

ORDER

The Respondent, Midon Restaurant Corporation, d/b/a Burger King, Albany, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from limiting its employees' solicitations at its facility at all times or at times when they are not "on the clock" or, in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Albany, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the remaining portions of the complaint, paragraphs V(a) and (b) and VI, be dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT prohibit you from soliciting at the restaurant at all times or while you are "on the clock."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your Section 7 rights.

MIDON RESTAURANT CORPORATION, D/B/A BURGER KING

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."